UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

RENAISSANCE HOTEL OPERATING COMPANY d/b/a RENAISSANCE PHOENIX DOWNTOWN HOTEL

And **Case 28-CA-181477**

UNITE HERE, LOCAL 631

And

ERUBEY QUINTERO, an Individual

Party in Interest

MARRIOTT INTERNATIONAL, INC.

And **Case 28-CA-187281**

UNITE HERE, LOCAL 631

BRIEF IN SUPPORT OF NOTICE TO SHOW CAUSE BY RESPONDENTS RENAISSANCE HOTEL OPERATING COMPANY AND MARRIOTT INTERNATIONAL, INC.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Esplanade Center III, Suite 800
2415 East Camelback Road
Phoenix, Arizona 85016
Telephone: (602) 778-3700
Facsimile: (602) 778-3750

INTRODUCTION

Respondents Renaissance Hotel Operating Company d/b/a Renaissance Phoenix Downtown Hotel and Marriott International, Inc. (collectively, "the Hotel") respectfully request that the Board revoke its approval of the Amended Stipulation and Joint Motion and remand this case to Region 28 for further proceedings consistent with the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017). The Hotel further requests that the Board direct Region 28 to find that the facially neutral rules, policies, and handbook provisions challenged by the Counsel for the General Counsel ("CGC") are lawful Category I rules under *Boeing*.

The CGC challenged the facially neutral rules, policies, and handbook provisions at issue under the "reasonably construe" test established by the Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). However, while this matter was pending, the Board overruled the *Lutheran Heritage* "reasonably construe" test and announced a new standard for determining whether the mere maintenance of a facially neutral work rule, policy, or handbook provision violates Section 8(a)(1) of the Act. *See The Boeing Co.*, 365 NLRB No. 154 (2017). Under *Boeing*, the Board assigns facially neutral policies, rules, and handbook provisions to one of three categories. "Category I" rules are lawful to maintain, either because (i) when reasonably interpreted, they do not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by legitimate business justifications. "Category II" rules warrant individualized scrutiny to determine whether they would prohibit or interfere with NLRA rights, and, if so, whether the adverse impact on NLRA rights is outweighed by legitimate justifications. "Category III" rules are unlawful to maintain because they prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rules. The Board held that it would apply this new framework retroactively to all pending cases. In further support of the Hotel's position that dismissal is appropriate absent

withdrawal, on June 6, 2018, the General Counsel issued Memorandum GC 18-04 ("the G.C. Memo"), providing additional guidance on what rules belong in Categories I, II and III.

For the reasons below, the rules, policies, and handbook provisions challenged in the Complaint are lawful Category I rules. Accordingly, the Board should: (1) remand this case to Region 28 for further proceedings consistent with the Board's decision in *Boeing*; (2) direct Region 28 to find that the challenged rules, policies, and handbook provisions are lawful Category I rules; and (3) instruct Region 28 to dismiss the Complaint in its entirety absent withdrawal.[1]

ARGUMENT

I. THE RULES, POLICIES, AND HANDBOOK PROVISIONS CHALLENGED BY THE CGC ARE LAWFUL CATEGORY I RULES UNDER *BOEING*.

A. Definition of "Confidential Information."

The Complaint alleges that the handbook's definition of "Confidential Information" unlawfully restricts Section 7 activity. [Jt. Ex. 4, at 4.] The challenged language states:

> "Confidential Information" is information in any medium (including documentation, computer files, compact disks, voicemail, transmissions between systems, email and other digital media and oral information) created, obtained or used by the Company that derives independent value from not being generally known to the public. Confidential Information includes information regarding the Company's customers, sales and marketing plans, pricing strategy, personnel matters, finances, means of doing business (including all technical system information), standard operating procedures, manuals, internal memoranda and trade secrets . . . It is important not to disclose or remove information or materials unique to the Company. Any disclosure of Company or guest information to unauthorized personnel will result in discipline, up to and including termination.

[1] As the Hotel argued in its Initial Brief, the Complaint should be dismissed for the additional reason that the Union waived its right to challenge these rules, policies, and handbook provisions at issue. The Hotel provided a copy of the handbook to the Union prior to implementation along with an invitation to discuss any concerns it may have had regarding the handbook. The Union failed to respond. Instead, it filed the underlying Charge after Hotel employees filed a decertification petition. The Union waived its right to challenge any of the provisions in the handbook by not requesting bargaining after receiving timely notice of the changes. *See, e.g.*, *Associated Milk Prods.*, 300 NLRB 561 (1990) (holding that the union waived its right to challenge a change to employees' pension funds when it ignored the company's letter announcing the change and failed to request bargaining).

> This policy does not prohibit associates from discussing wages, hours, or other terms and conditions of employment.

[Jt. Ex. 7, at 14-15.]

The G.C. Memo directs Regions to place rules that protect an employer's confidential, proprietary, and customer information or documents in Category I because employers have substantial legitimate interests in protecting such information and the rules have little, if any, adverse impact on NLRA-protected activity. *See* G.C. Memo, pp. 9-11. The Hotel's definition of "Confidential Information" is clearly aimed at protecting confidential, proprietary, and customer information from unauthorized disclosure. As such, it is a lawful Category I rule.

B. "Termination of Employment" Policy.

In addition to challenging the handbook's definition of "Confidential Information," the Complaint challenges the Hotel's disciplinary policy regarding the unauthorized review, disclosure, or distribution of Confidential Information. [Jt. Ex. 4, at 6.] The excerpt reads:

> **Termination of Employment**
>
> …
>
> You engage in serious or egregious behavior or a policy violation related to any of the following rules, which are serious breaches of responsibility to the Company warranting immediate termination without any prior warnings or discipline:
>
> …
>
> Unauthorized review, disclosure or distribution of confidential or proprietary information in violation of the Company's Information Protection Agreement.

[Jt. Ex. 7, at 26-27.]

Because the Hotel's definition of "Confidential Information" is a lawful Category I rule, it logically follows that the Hotel's policy regarding the unauthorized review, disclosure, or distribution of Confidential Information being a terminable offense is also a lawful Category I rule.

See G.C. Memo, pp. 9-11. This classification follows long-standing Board law that employers may discipline employees who disclose confidential information in violation of company policy. *See, e.g.*, *Beckley Appalachian Reg'l Hosp.*, 318 NLRB 907, 908-09 (1995) (affirming employee's discharge for disclosing confidential records).

C. "Confidential and Proprietary" Handbook Designation.

The Complaint alleges that the "Confidential and Proprietary" designation in the footer of the handbook violates the Act. [Jt. Ex. 4, at 6.] The CGC fails to recognize that the Hotel has made a significant investment in drafting and analyzing its employee handbook to comply with Board law and provide its employees with guidance for their performance and a work environment that is safe, enjoyable, and rewarding. The Hotel has a substantial business interest in protecting its confidential and proprietary information and preventing its competitors from gaining an unfair business advantage. This is precisely why rules protecting an employer's confidential and proprietary information belong in Category I. *See* G.C. Memo, pp. 9-11.

The potential impact of the footer on Section 7 rights is non-existent. The footer does not prohibit employees from talking to each other about the handbook or the terms and conditions of their employment. Nor does it prohibit employees from sharing the handbook with the Union – in fact, it is undisputed that the Hotel gave the Union a copy of the handbook prior to its dissemination to employees. Because the designation in the footer's potential impact on NLRA rights is nominal at best and the Hotel has a substantial legitimate interest in protecting its investment in its handbook, the designation appropriately falls within Category I.

D. Accuracy and Unsubstantiated Claims Rule.

The Complaint challenges three provisions in the Hotel's "Social Media Rules of Conduct & Guidelines" as allegedly interfering with Section 7 rights. [Jt. Ex. 4, at 5.] The first challenged

provision reads:

> If you are in a discussion about the Company's products or services, don't make unsubstantiated claims. If you have questions about whether you are authorized to represent the Company and discuss Company information in a public social media forum, you should discuss it with your manager and/or send an email to Marriott.Communications@marriott.com.

[Jt. Ex. 7, at 19.]

This rule ensures the Hotel, as a publicly traded corporation, prevents the dissemination of unsubstantiated, misleading, and non-public information that could implicate the jurisdiction of the U.S. Securities and Exchange Commission. *See, e.g.*, 15 U.S.C. § 78r. The G.C. Memo instructs Regions to assign rules requiring authorization to speak for the company to Category I because they have no impact on Section 7 rights and employers have a significant interest in ensuring only authorized representatives speak for the company. *See* G.C. Memo, p. 14. The G.C. Memo also directs Regions to place rules prohibiting misrepresentation (such as "misrepresenting the company's products or services or its employees") in Category I. *See id.*, pp. 11-13. The Hotel's accuracy and unsubstantiated claims rule is a lawful Category I rule.

E. Professionalism Policy.

The Complaint also alleges that the following language from the Hotel's "Social Media Rules of Conduct & Guidelines" violates the Act:

> **Be Thoughtful About How You Present Yourself.** One of the goals of social media is to create dialogue, and participants won't always agree on an issue. When confronted with a difference of opinion, keep your cool. Ignoring an objectionable comment sometimes gives it less credibility than responding in an inflammatory way. Respect your audience, present your views in a clear manner, and be the first to correct your mistakes. Don't use slurs, personal insults, obscenities (even in abbreviated or acronym form), or engage in any conduct that could be viewed as malicious, threatening or obscene, or that might constitute harassment on the basis of race, gender, disability, religion or any other status protected by law or Company policy. Do not post information or statements that you know to be false about the Company, other associates, guests, customers, vendors, or business partners.

[Jt. Ex. 4, at 5-6; Jt. Ex. 7, at 20.]

In *Boeing*, the Board held that "rules requiring employees to abide by basic standards of civility" are Category I rules. *Boeing*, 365 NLRB No. 154, slip op. at 15. For example, the Board explained that a rule that requires "harmonious interactions and relationships" in the workplace is lawful. *Id.* This is precisely the purpose of the Hotel's professionalism policy, as evidenced by the suggestions to "keep your cool," "respect your audience," and not use slurs, insults, obscenities, or engage in any other intimidating or harassing conduct. The G.C. Memo also directs Regions to place rules prohibiting defamation or misrepresentation in Category I. *See* G.C. Memo, pp. 11-13. It logically flows that the Hotel's professionalism policy falls within Category I.

F. Posting Images Policy.

The final excerpt from the Hotel's "Social Media Rules of Conduct & Guidelines" that is challenged in the Complaint reads:

> Also, do not post pictures or video of any guest, customer, vendor, business partner or other third party without the written consent of that individual. Be cautious about posting pictures or video of other associates without the other associates' consent.

[Jt. Ex. 4, at 5; Jt. Ex. 7, at 19.]

In *Boeing*, the Board placed no-photography and no-recording rules squarely in Category I. Boeing's policy prohibiting the "use of [camera-enabled devices] to capture images or video" was found lawful because photography is not central to protected concerted activity and employers have substantial legitimate interests for limiting photography in the workplace. *Boeing*, 365 NLRB No. 154, slip op. at 19; G.C. Memo, pp. 5-6. The Hotel's rule, which is aimed at ensuring compliance with intellectual property laws and protecting guest privacy and security, is actually less restrictive than the rule the Board found lawful in *Boeing*. It does not prohibit employees from using cameras or phones or even categorically prohibit posting pictures of guests, customers,

and other third parties. Thus, the Hotel's posting images policy is a lawful Category I rule.

G. Provisions Promoting Compliance With State and Federal Employment Laws.

The Complaint next challenges language in the handbook's "Policy Prohibiting Harassment & Unprofessional Conduct" and "Termination of Employment" provisions:

> **Policy Prohibiting Harassment & Unprofessional Conduct**
>
> …
>
> The Company will not tolerate harassment of any associate by any other associate, manager, supervisor, vendor, guest, client, or customer . . . With this policy, the Company prohibits not only unlawful harassment, but also other unprofessional conduct or actions . . .
>
> **Termination of Employment**
>
> …
>
> You engage in serious or egregious behavior or a policy violation related to any of the following rules, which are serious breaches of responsibility to the Company warranting immediate termination without any prior warnings or discipline:
>
> …
>
> Harassing, discriminatory, or retaliatory conduct toward another employee, guest or vendor in violation of the Policy Prohibiting Harassment & Unprofessional Conduct.

[Jt. Ex. 4, at 6; Jt. Ex. 7, at 11, 12, and 26.]

It is now settled that civility and professionalism rules are Category I rules. *See supra*, pp. 5-6; G.C. Memo, pp. 3-5. The Hotel is legally obligated under federal and state employment laws to provide a workplace free of unlawful harassment, discrimination, and retaliation. The Board would be hard-pressed to find an employer who does <u>not</u> maintain policies prohibiting workplace harassment, discrimination, and retaliation. There is simply no restriction on Section 7 rights that outweighs the significant benefits created by the Hotel's anti-harassment, anti-discrimination, and anti-retaliation policies. These provisions fall comfortably within Category I. *See, e.g., Lutheran*

Heritage, 343 NLRB at 647 (holding that employers may enact rules prohibiting harassment).

H. "Personal & Social Relationships In The Workplace" Policy.

The Complaint alleges that the following language from the Hotel's "Personal & Social Relationships in the Workplace" policy is unlawful:

> You should respect the privacy of guests by maintaining professional and businesslike relations with them at all times . . . With the exception of Company-sponsored functions or job-related events, associates are prohibited from engaging in social or personal activities with guests on Company premises. When it comes to interactions with guests outside of the workplace, whether through social media or otherwise, extreme caution is required. Such interactions may not be welcomed by the guest and, depending on the circumstances, may call into question your professionalism.

[Jt. Ex. 4, at 4-5; Jt. Ex. 7, at 18.]

However, this policy is an extension of the Hotel's other professionalism and civility policies. *See* G.C. Memo, pp. 3-5. It is intended to minimize distractions so employees focus on ensuring guest safety and privacy. The policy does not seek to regulate employee off-duty conduct, and because employees have no Section 7 right to socialize with Hotel guests, its impact on Section 7 rights is minimal at best. It is difficult to imagine more compelling interests in the hospitality industry than guest privacy and safety. The Board should direct Region 28 to find that the Hotel's "Personal & Social Relationships in the Workplace" policy is a lawful Category I policy. *See, e.g.*, G.C. Memo, p. 6 ("during working time an employer has every right to expect employees to perform their work and follow directives"); *Guardsmark, LLC*, 344 NLRB 809, 809-10 (2005) (holding that a rule prohibiting employees from "fraterniz[ing] on or off duty . . . with the client's employees" was lawful).

I. "Personal Mobile Devices" Policy.

The Complaint also alleges that the Hotel's "Personal Mobile Devices" policy unlawfully interferes with employee Section 7 rights. [Jt. Ex. 4, at 5.] The challenged language reads:

> Never use [your mobile device] when in any guest area . . . Under no circumstances should you use your personal electronic device in any guest area . . . Device may not be visible . . . If you need to use your personal electronic device due to an emergency during work time, other than before or after your shift or on your break, you must first request and receive permission from your manager or supervisor.

[Jt. Ex. 7, at 17.]

The Hotel's "personal mobile device" policy is designed to ensure that employees focus their attention on Hotel guests and provide the level of hospitality and service guests expect from the Hotel. It is limited to working time and guest areas. The G.C. Memo instructs Regions to assign rules that prohibit on-the-job conduct that adversely affects operations to Category I because "during working time an employer has every right to expect employees to perform their work and follow directives." G.C. Memo, pp. 6-7. The Hotel's policy is narrowly tailored to ensuring productivity and a high level of customer service. It falls within Category I.

J. Distribution Rule.

The final rule challenged in the Complaint states: "The distribution of any literature, pamphlets or other materials in any work area of the property is prohibited." [Jt. Ex. 4, at 6; Jt. Ex. 7, at 17.] In *Boeing*, the Board explained that it "has recognized that it is lawful for an employer to adopt . . . no-distribution rules prohibiting all distribution of literature – including union-related literature – in work areas." *Boeing*, 365 NLRB No. 154, slip op. at 8 (emphasis in original). The Board in *Boeing* "did not alter well-established standards regarding certain kinds of rules where the Board has already struck a balance between employee rights and employer business interests," including no-distribution rules. G.C. Memo, pp. 1-2.

The Hotel's rule prohibiting distribution of literature in work areas follows long-standing Board precedent allowing employers to prohibit distribution in work areas. *See, e.g.*, *Boeing*, 365 NLRB No. 154, slip op. at 8. Indeed, rules that prohibit distribution in work areas but not in non-

work areas are "presumed valid." *St. John's Hosp.*, 222 NLRB 1150, 1150 (1976) ("Rules prohibiting distribution of literature are presumed valid unless they extend . . . to nonworking areas."). Accordingly, the Hotel's distribution rule is a lawful Category I rule.

CONCLUSION

For the foregoing reasons, the Board should revoke its approval of the Amended Stipulation and Joint Motion, and remand this case to Region 28 for further proceedings consistent with the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017). The Board also should direct Region 28 to find that the rules, policies, and handbook provisions previously challenged by the CGC are lawful Category I rules and to dismiss the Complaint in its entirety absent withdrawal.

Dated this 11th day of October 2018.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By s/ Thomas M. Stanek

Thomas M. Stanek
Mark G. Kisicki
Christopher J. Meister
2415 East Camelback Road, Suite 800
Phoenix, Arizona 85016
602-778-3700
602-778-3750 (facsimile)

Attorneys for Respondents
Renaissance Hotel Operating Company d/b/a Renaissance Phoenix Downtown Hotel and Marriott International, Inc.

ORIGINAL of the foregoing E-Filed
this 11th day of October 2018, with:

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570

COPIES of the foregoing sent via E-Mail and U.S. Mail
this 11th day of October 2018, to:

Cornele A. Overstreet
Regional Director
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004
E-Mail: cornele.overstreet@nlrb.gov

Kyler A. Scheid
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004
E-Mail: kyler.scheid@nlrb.gov

Kirill Penteshin
General Counsel
UNITE HERE, Local 631
464 S. Lucas Ave., Suite 201
Los Angeles, CA 90017
E-Mail: kpenteshin@unitehere11.org

Eric B. Meyers, Attorney at Law
McCracken, Stemerman & Holsberry, LLP
595 Market Street, Suite 800
San Francisco, CA 94105
E-Mail: ebm@msh.law

/s Frankie Vandehei

35936015.1